INTERNATIONAL RESPONSIBILITY OF THE STATE FOR INJURIES SUSTAINED BY ALIENS DURING CIVIL WAR

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One of the most interesting and practical phases of the international responsibility of the state is its responsibility for injuries sustained by aliens during civil war. Injuries sustained in actual belligerent operations are not usually compensated, on the principle of non-liability for war damages. The importance of a separate discussion of injuries sustained during civil war arises out of the legal position which may be attributed to insurgents and the resultant liability of the state for injuries committed by them. The difficulty of the subject is also enhanced by the fact that the practice of states has differed to some extent in the application of such rules as we may consider to govern the subject.

The question of terminology need not detain us long. Publicists have distinguished between sedition, insurrection, and civil war; but for our present purposes we may regard these as different degrees of a political uprising of part of a civilized society against the lawfully constituted authorities.

Different theories have prevailed as to the liability of the state for injuries sustained by aliens in civil war. One doctrine, supported by Brusa, Bar and other distinguished publicists, is to the effect that the state is responsible on principle for all such damage sustained by aliens. This doctrine of responsibility, briefly, is based on one of several theories: (1) the fault of the state in permitting a revolution to arise; (2) the theory of expropriation, according to which the state at the sacrifice of individual property derives a public benefit from the suppression of a revolution; (3) the theory of risk, according to which the state assumes the risk of maintaining order—in other words, the state becomes a guarantor of safety; (4) the theory of social insurance, by which the state fulfills its highest mission in preserving its integrity and should compensate those individuals who suffer accidental sacrifices in the attainment of this end.

These theories, however interesting, have all been abandoned. The

doctrine which has now received general support is that on principle the state is not responsible for the injuries sustained by aliens at the hands of insurgents in civil war unless there is proven fault or a want of due diligence on the part of the authorities in preventing the injury or in suppressing the revolution.

This doctrine is predicated on the assumption that the government is reasonably well ordered, and that revolution and disorder are abnormal conditions. "Where a state has fallen into anarchy, or the administration of law has been nerveless or inefficient, or the government has failed to grant to a foreigner the protection afforded citizens, or measures within the power of the government have not been taken to protect those under its jurisdiction from the acts of revolutionists," says Hall, the general rule is suspended and foreign states may not only intervene by force for the protection of their subjects, but may demand indemnities, whether the injuries were sustained at the hands of the government forces or the insurgents. The mere fact that the state is subject to frequent revolution does not, however, affect the general rule of non-liability. The Spanish treaty claims commission, after hearing lengthy arguments, adopted the following rules:

"In order to recover for damages done by insurgents" claimants must "allege and prove that at the time and place when and where the injury was done the [government] authorities could, by due diligence, and should have prevented such injury."

"In order to recover for damages done by the [government] forces" it is necessary to prove "that the acts done which resulted in the injury were done wantonly and unnecessarily."

The burden of proof is on the claimant. International commissions have enforced this rule, notwithstanding the difficulty of proving governmental negligence. In mob violence cases, on the other hand, notwithstanding the general rule of evidence, the government has generally been held to prove due diligence.

The rule of non-liability for injuries sustained in civil war extends to those inflicted during actual hostilities or by the agents or authorities of the government in the actual suppression of the revolution and admittedly necessary to that end, but is confined strictly to injuries inflicted in belligerent action against the insurgents. The titular government is accorded the free exercise of war rights. Thus it may, without incurring liability, prevent communication with the revolutionists, provided that in the exercise of the measure the rules of war are not violated.

Governments have at times, however, voluntarily paid indemnities to their own citizens and to foreigners for injuries inflicted by their own troops and in such a case the United States would probably insist on equal treatment for American citizens.

The government *is* liable for violations of the rules of war and particularly for wanton acts of pillage and incidental occupation of neutral property by government soldiers. The legitimate government is not in general liable to the neutral owners of property destroyed by the government troops while in the hands of rebels, for it has then become enemy property subject to destruction. Where the government, however, receives a benefit from neutral property taken from the rebels and originally seized by the latter, equity requires, it has been held, that it should pay for the property and for injuries sustained by the property through the unusual use to which it has been subjected while in government hands. The Spanish treaty claims commission made awards for the seizure and use by Spanish forces of private property in Cuba, regardless of the purpose of the appropriation, whether to satisfy the needs of the army or to prevent its falling into the hands of the enemy. The government is bound to make compensation for the use of neutral vessels in its ports, and for their detention for purposes of the war. This exercise of the right of angary and embargo is often regulated by treaty. A state is also liable for injuries sustained by aliens in closing a port without due and proper previous notification, a violation indeed of the laws of blockade. In this connection, it is important to determine whether a state of war or only a state of insurgency exists; for while a blockade of its own ports by the parent government will be respected if war exists, it will not be respected, if war does not exist and the decree is not effectively enforced by physical naval power.

Let us now examine certain limitations on the general rules governing state responsibility for injuries occurring in civil war. These arise out of (1) the recognition of the belligerency of the insurgents by the parent state or by foreign governments, or the existence of actual belligerency; (2) the continued residence of a foreigner in the territory in insurrection; (3) participation in the rebellion on the part of a foreigner; and (4) the effect of amnesty.

Recognition by the parent government of the belligerency of insurgents against it or the existence in fact of a state of war releases the state from responsibility for all acts of the insurgents subsequent to the recognition. Recognition by some foreign governments only, operates as a release as against their subjects, and other non-recognizing powers

are not necessarily bound. The rule that the government is responsible for such acts of insurgents as were perpetrated through its own negligence is therefore suspended by the act of recognition. Formal recognition is not, however, necessary to raise insurgency to the plane of belligerency. Belligerent rights may be acknowledged without recognition and this is usually the case on the part of the parent government. In the Civil War, for example, the non-responsibility of the United States resulted not from the recognition of the belligerency, but from the fact of belligerency itself, whether recognized or not by other governments. The importance of establishing the fact or a recognition of belligerency is therefore great. Up to that point the government may treat the rebels as traitors and criminals and apply to them its penal law, and is subject to such responsibility as arises out of a proven want of diligence to prevent their acts, and in some cases, it has been held, out of the failure to punish the guilty offenders. There is some support for the doctrine which has been advanced that a government can avoid responsibility for the acts of insurgents by extending recognition or treating them in fact as a belligerent party. After recognition of belligerency begins, the parent government is no longer liable, under any circumstances, for any of the acts of unsuccessful insurgents, nor for its own failure to act wherever the insurgent power extends. If the revolutionists are successful, as we shall see, the government created through their efforts must assume responsibility for their acts. Recognition does not affect the liability of the parent government for the unlawful acts of its own agents and authorities. The seizure of neutral property by government forces or depredations by officered soldiers of the government impose liability upon the state at all times.

The effect of a continuous residence by aliens in the territory rent by civil war is to place them in the same position as nationals. By remaining, they assume the risk of injury, within the limitations prescribed by the rules of war. No doctrine is more strongly emphasized by Latin-American publicists than the general principle that aliens coming to and settling in a country must share its fortunes, and have no claim to better treatment than nationals. In the case of injuries occurring during civil war, without fault of the authorities, the United States has been more observant of this principle than the countries of Europe. In 1888, Secretary of State Bayard said:

> It is the duty of foreigners to withdraw from such risks and if they do not, or if they voluntarily expose themselves to such risks, they must take the consequences.

Such was the position assumed by the United States in the Civil War. It has been upheld by international commissions and would under ordinary circumstances probably represent the position of the United States. To visit a locality in a state of insurrection is an assumption of and voluntary exposure to the risks involved.

Aliens who participate in an insurrection should and do generally forfeit the protection of their own government. Aliens who had given aid and comfort to the Confederates were excluded from the right to compensation before the domestic and international commissions sitting after the Civil War. A similar rule was applied in Colombia and other Latin-American republics by their domestic commissions and by the Spanish treaty claims commission. Such participation is a palpable forfeiture of neutral protection. Several treaties between European and Latin-American countries provide expressly that aliens taking part in civil wars or insurrections or undertaking political office forfeit their exemptions and privileges as foreigners and are to be treated as natives.

The effect of amnesty to the rebels upon the liability of the government is somewhat uncertain. When the government has treated the rebels as criminal offenders, and they did not attain the status of revolutionists, an amnesty operates as a pardon and a failure to punish criminals, a recognized ground of state responsibility. So in the "Montijo" case the umpire, Bunch, held the government liable, particularly because the grant of the amnesty deprived the claimant of the power of trying the responsible rebels for the injuries inflicted. Secretary of State Fish applied the same rule to Mexico, there having been no recognition of belligerency. In fact, in numerous cases before courts of arbitration, the failure to punish was regarded as one of the principal grounds of state liability. The failure to prosecute the rebels, and indeed their appointment to office under the government has been considered a tacit approval of their acts and an assumption of liability on the part of the government. In several important cases, however, the granting of an amnesty to rebels has been held not to constitute an assumption of liability for their acts. Thus the United States was not considered, by an amnesty, to have assumed liability for the acts of the Confederates, and on principle, this appears to be the better rule.

Much difficulty is created by the case of insurgents controlling a part of a territory in insurrection and exercising authority over the area they control. The question has arisen in connection with forced loans and the collection of customs dues by such temporary authorities. Whether the general government is bound by their acts depends

upon the extent to which they have become *de facto* authorities. Secretary of State Fish in 1873 asserted the liability of Mexico for forced loans levied by insurgents, basing the contention on the stipulation of the treaty of 1831 with Mexico. Treaties of the United States with most of the countries of Latin America exempt American citizens from forced loans, and in these cases it is possible that the general government will be held liable for the exaction of such a loan by *de facto* authorities exercising jurisdiction over a certain area, whether an insurgent faction or not.

The legitimacy of the collection of custom dues and other taxes by insurgents in control of a certain area depends, similarly, upon the extent to which they are temporarily *de facto* authorities. If they are in exclusive control the legitimate government has no right to demand a second payment of taxes. It was said in the case of Guastini:

> Money paid to the *de facto* authorities in the shape of public dues, must be considered as lawfully paid, and receipts given by them regarded as sufficient to discharge the obligations to which they relate. Any other view would compel the taxpayer to determine at his own peril the validity of the acts of those executing public functions in a regular manner.

The United States has always insisted that a payment to *de facto* authorities releases the tax payer from a second payment, especially where made under protest. Where the insurgents have not become actual *de facto* authorities, but have, nevertheless, collected dues, the rule as to second collections has not been uniform. It is rather a question of gracious remission of duties to which the titular government has a right.

A successful revolution stands on an entirely different basis. The government created through its efforts is liable for the acts of the revolutionists as well as for those of the titular government it has replaced. Its acts are considered those of a *de facto* government, for which the state is liable from the beginning of the revolution, on the theory that it represented *ab initio* a changing national will, crystallizing in the final successful result. Thus the government created through a successful revolution becomes liable for all services rendered to the revolutionists. The unlawful acts of successful revolutionists render the government equally liable. The successful revolutionists appear to be bound from the beginning of the revolution by the stipulations of national treaties, for the violation of which they will be held liable as successors to the titular government.

Governments have on numerous occasions voluntarily made compensation, as a matter of policy rather than as a matter of law, for the injuries sustained by natives and foreigners during civil war, limited generally to the injuries inflicted by government forces, but sometimes extended to include the acts of both parties.

The states of Latin America, exposed as they have been to constant revolutionary movements, have on numerous occasions been subjected to liability by the countries of Europe for the injuries inflicted by insurgents or during civil war. This has been in part explained by the fact that the continuous state of revolutionary unrest takes these uprisings out of the category of fortuitous events, which the government is unable, by due diligence, to prevent. The European nations, in supporting claims arising out of these civil wars, regardless of whether insurgents or authorities caused the injury, have sometimes taken the ground that the responsibility of the state is due to a lack of diligence in preventing or suppressing uprisings. This ground could hardly be general, for, as Hall remarks,

> The highest interests of the state are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign state.

Moreover, if they were negligent in fact, it would be extremely difficult to prove, and if the claims rested upon this ground alone only few of them could be prosecuted to payment. As a matter of fact, the ground is, as a rule, advanced for plausibility alone, and assuming that the government is so organized that civil commotion is only a fortuitous event and not one invited by lack of proper political organization, we must support the Latin American republics in their endeavors to be relieved from the diplomatic pressure of claims resulting from injuries suffered in the legitimate operations incident to civil war, or caused by insurgents.

In order to avoid this pressure of claims arising out of civil wars, the Latin American states have succeeded in concluding numerous treaties with European nations by which the latter admit the non-liability of the government for injuries sustained by their subjects in civil war at the hands of revolutionists or savage tribes, provided the damage is not caused through the fault or negligence of the authorities of the government. The states of Latin America have among themselves concluded treaties providing for absolute non-liability,

whether the injuries sustained by their respective citizens are due to the acts of insurgents or legitimate authorities. These states have also resorted to other methods to avoid the presentation of claims by foreigners for injuries sustained during civil war. In the resolution of the Pan-American congresses, in their constitutions, and in their statutes, they have provided that the alien taking part in a civil struggle shall be treated as a native and shall lose his privileges of alienage. These municipal regulations provide generally that the alien shall have the same civil rights as the national and shall have the right to the diplomatic protection of his own country only in the event of a denial of justice after an exhaustion of local remedies. Foreign governments, however, have not consented to be bound by any such attempts to limit their right of diplomatic intervention. With the normal growth of Latin America in political stability and a greater confidence in the independence and impartiality of the judiciary, it is probable that the pressure of foreign claims based on civil war as on other injuries will gradually diminish.